

v. 2831

No. 13883

United States
Court of Appeals
For the Ninth Circuit.

LESLIE H. CHAPPELL,

Appellant.

vs.

C. D. JOHNSON LUMBER CORPORATION,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon.

FILED

AUG 31 1953



No. 13883

United States
Court of Appeals
For the Ninth Circuit.

LESLIE H. CHAPPELL,

Appellant.

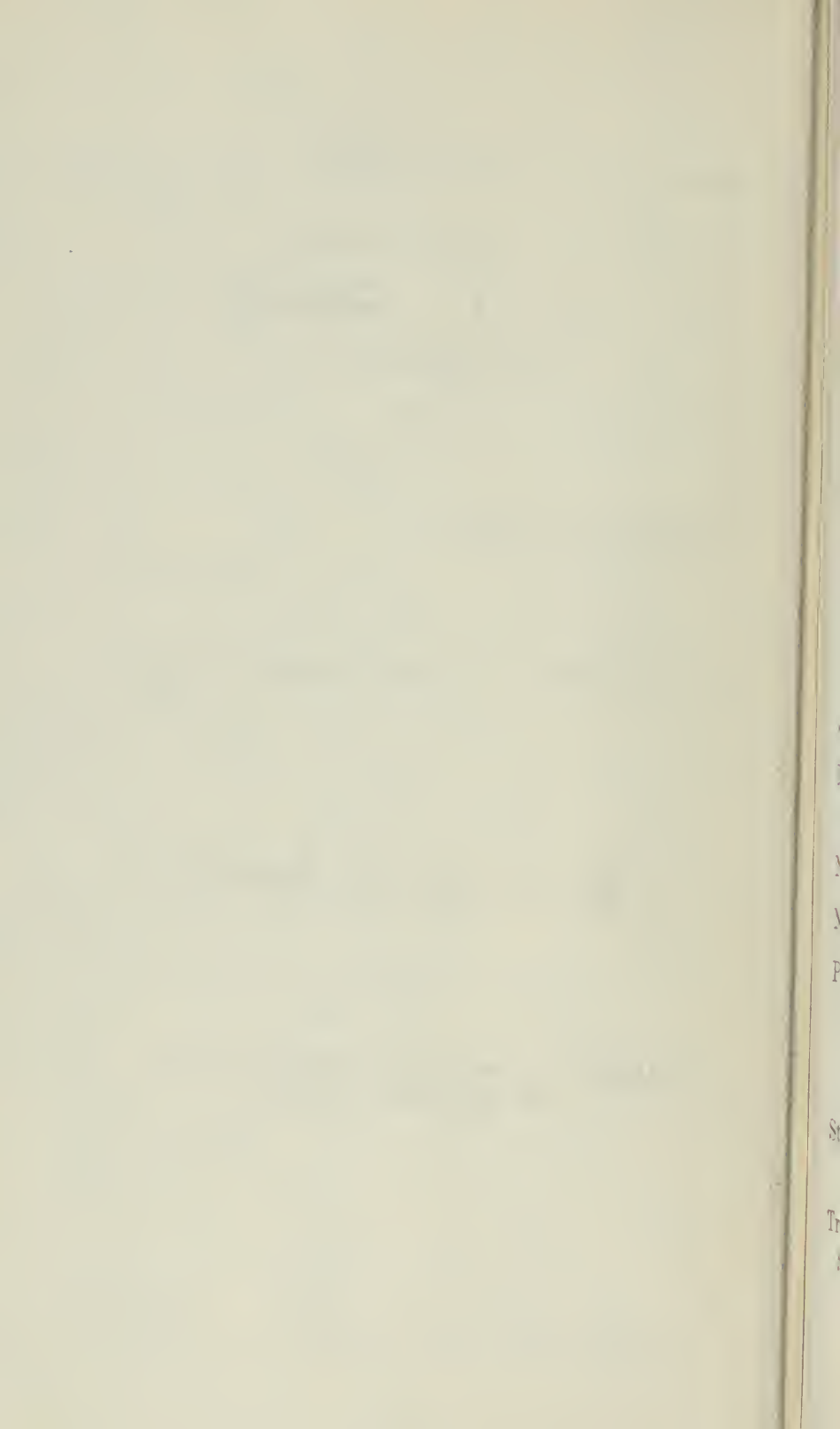
vs.

C. D. JOHNSON LUMBER CORPORATION,

Appellee.

Transcript of Record

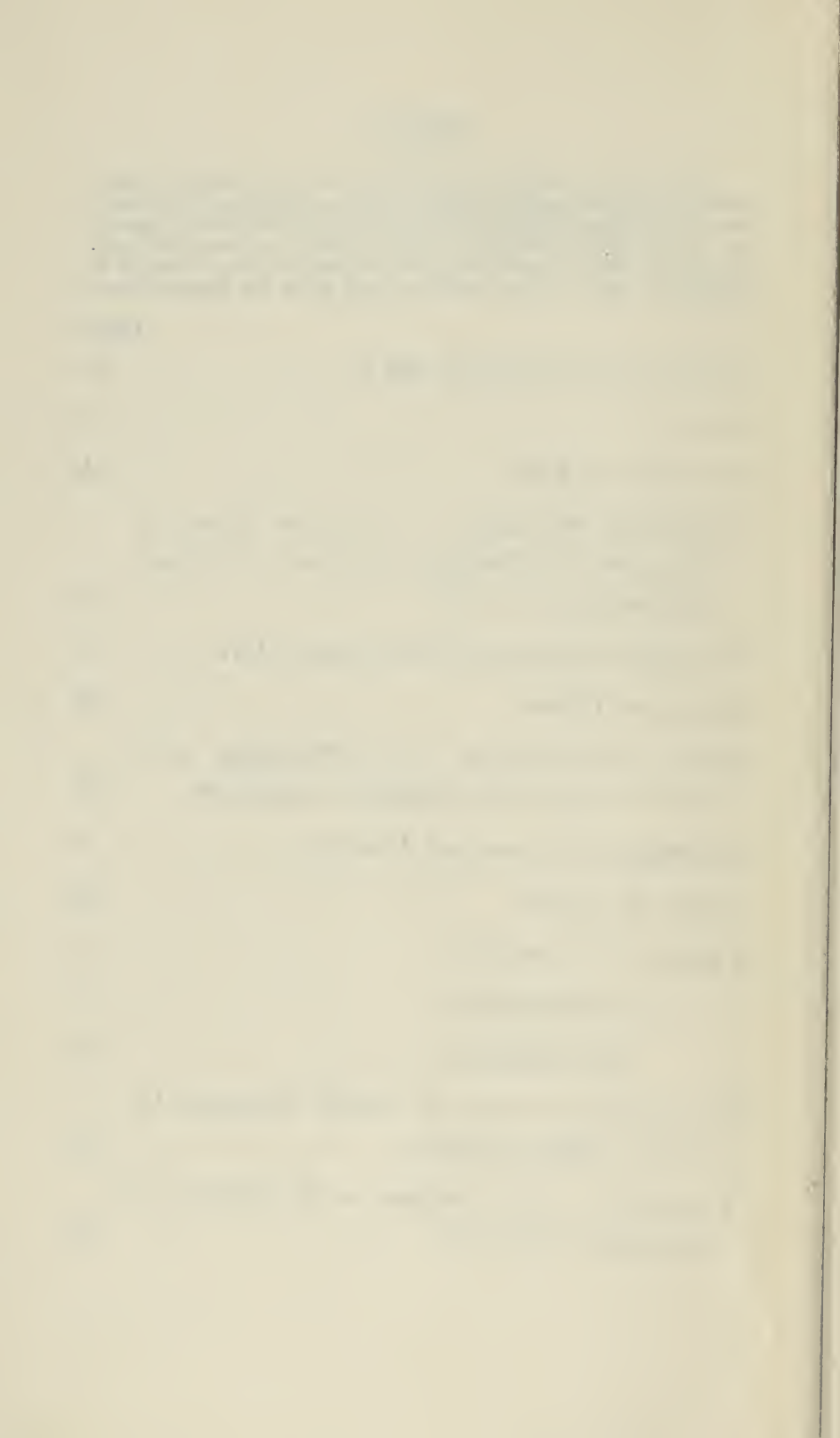
Appeal from the United States District Court
for the District of Oregon.



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Affidavit of Chappell, Leslie H.	16
Answer	12
Certificate of Clerk	24
Condensed Statement in Narrative Form of Testimony of Plaintiff-Appellant on Deposition September 2, 1952	23
Findings of Fact and Conclusions of Law	17
Judgment Order	21
Motion for Judgment on the Pleadings, or in the Alternative for Summary Judgment	15
Names and Addresses of Attorneys	1
Notice of Appeal	22
Petition for Removal	3
Ex. A—Complaint	6
B—Summons	11
Statement of Points on Which Appellant In- tends to Rely on Appeal	31
Transcript of Proceedings in Re Motion for Summary Judgment	25



NAMES AND ADDRESSES OF ATTORNEYS

GREEN, RICHARDSON & GREEN;

BURL L. GREEN,

Corbett Building,

Portland 4, Oregon,

For Appellant.

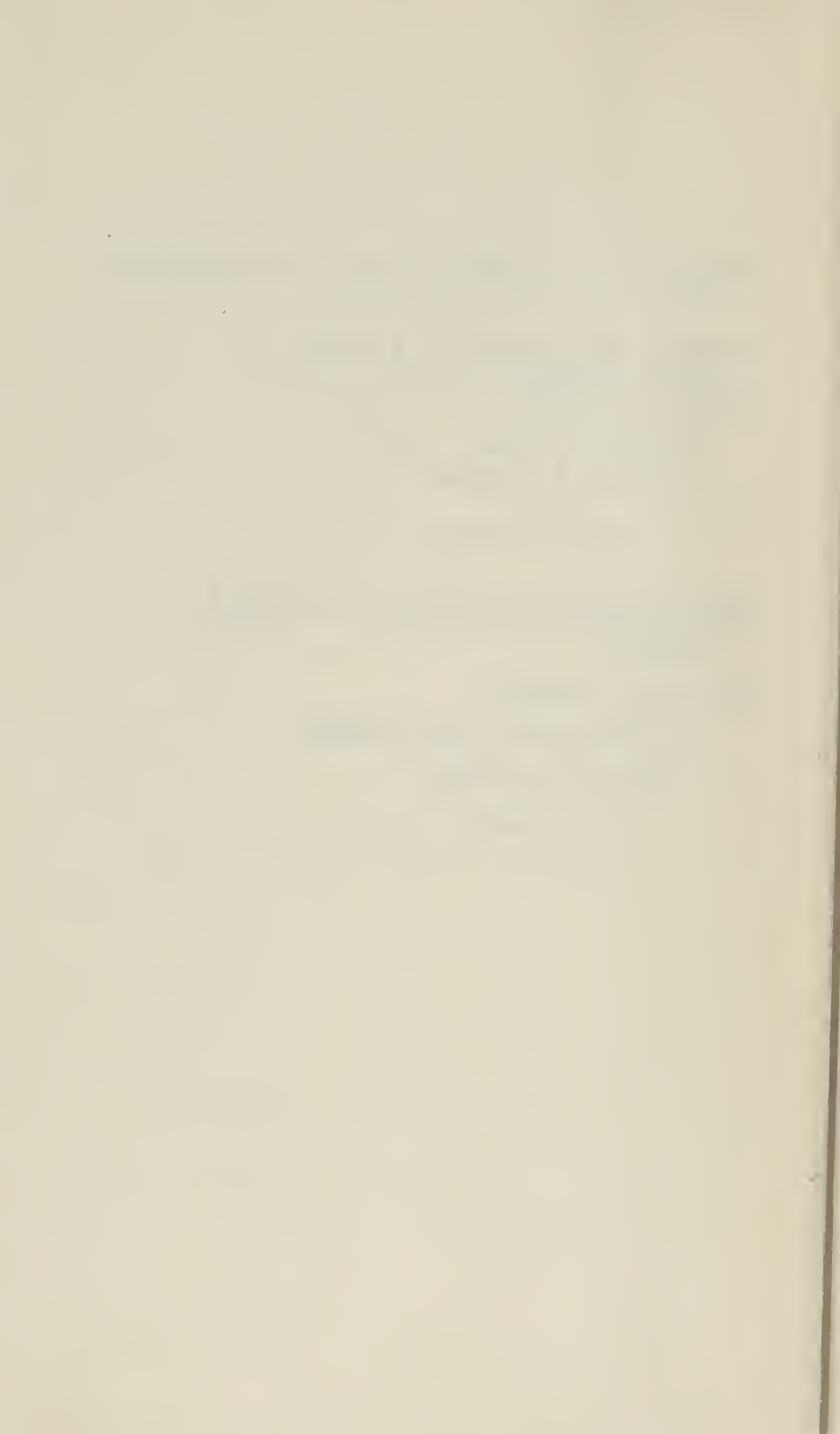
KING, MILLER, ANDERSON, NASH &
YERKE;

FRANK E. NASH,

926 American Bank Building,

Portland 5, Oregon,

For Appellee.



The United States District Court for the
District of Oregon

Civ. 6169

LESLIE H. CHAPPELL,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a
Corporation,

Defendant.

PETITION FOR REMOVAL

To The Honorable Judges of the United States Dis-
trict Court for the District of Oregon:

The petition of C. D. Johnson Lumber Corpora-
tion, a corporation, herein impleaded as C. D. John-
son Lumber Corp., a corporation, the defendant
above named, appearing specially and for the sole
and exclusive purpose of presenting this petition,
shows that:

On or about the 7th day of September, 1951, there
was commenced in the Circuit Court of the State
of Oregon, for the County of Lincoln, Civil Action
No. 9954, wherein the above-named Leslie H. Chap-
pell is plaintiff, and the above-named C. D. Johnson
Lumber Corporation, a corporation, your petitioner
herein, is defendant. After the commencement of
said action and on the 8th day of September, 1951,
service of complaint and summons therein was had
upon the defendant in Lincoln County, Oregon.
Copies of said complaint and summons are attached

hereto marked Exhibits A and B, respectively, and made a part hereof. No service or attempted service of any other process, pleadings or orders has been had upon defendant.

Said action is one of a civil nature, wherein the matter in controversy exceeds the sum of \$3,000, exclusive of interest and costs, and is, to wit, \$24,-387.90.

Said matter in controversy is between citizens of different states. Your petitioner, the defendant C. D. Johnson Lumber Corporation, a corporation, at the time of the commencement of said action was, ever since has been and still is a foreign corporation, created by and existing under the laws of the State of Nevada, and at all said times was and is a citizen and inhabitant of the State of Nevada, and not a citizen of the State of Oregon.

The plaintiff Leslie H. Chappell at the time of the commencement of said action was, ever since has been and still is a citizen and resident of the State of Oregon and a non-resident of the State of Nevada.

Said action is pending undetermined in the Circuit Court of the State of Oregon for the County of Lincoln, and twenty days after commencement of the action or after service of process in said action has not as yet expired.

Your petitioner desires to remove said action to the United States District Court for the District of Oregon, the district within which said action is pending. Your petitioner, as defendant in said action, makes and files with this petition a bond with good and sufficient surety, conditioned that the defend-

ant will pay all costs and disbursements incurred by reason of these removal proceedings, should it be determined that the case was not removable or was improperly removed.

Wherefore, your petitioner prays that upon the filing of the petition and bond herein and the giving of written notice to plaintiff, and upon the filing of a copy of this petition with the Clerk of the Circuit Court of the State of Oregon for the County of Lincoln, said action shall be deemed removed from said Circuit Court of the State of Oregon for the County of Lincoln to the United States District Court for the District of Oregon pursuant to the statutes of the United States in such cases made and provided.

C. D. JOHNSON LUMBER
CORPORATION,

KING, WOOD, MILLER,
ANDERSON & NASH,

By /s/ FRANK E. NASH,
Attorneys for Defendant.

United States of America,
District of Oregon,
State of Oregon—ss.

I, G. Hippler, being first duly sworn, depose and say that I am Assistant Secretary of C. D. Johnson Lumber Corporation, a corporation, the defendant herein; that I make this affidavit for and in behalf of said corporation; that I have read the foregoing

petition for removal, know the contents thereof, and the same is true as I verily believe.

/s/ G. HIPPLER.

Subscribed and sworn to before me this 15th day of September, 1951.

[Seal] /s/ CURTIS W. CUTSFORTH,
Notary Public for Oregon.

My commission expires 7/15/55.

EXHIBIT A

In the Circuit Court of the State of Oregon for the
County of Lincoln

No. 9954

LESLIE H. CHAPPELL,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORP., a Corporation,
Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant above named, complains and alleges:

I.

That at all times hereinafter mentioned the defendant was and now is a corporation duly organized and existing under and by virtue of the laws of one of the states of the United States, with a principal

office and place of business in the City of Portland, County of Multnomah, State of Oregon; that defendant has a plant located at Toledo, County of Lincoln, State of Oregon; which is engaged generally in the handling, loading, manufacturing and changing of lumber products and in such activity defendant makes extensive use of power-driven machinery; that defendant, in the furtherance of its business, as above set forth, employed an overhead crane or monorail operator whose particular job it was to pick up lumber off blocks and set it on blocks on a barge at the plant or establishment at Toledo, Oregon.

II.

That on or about November 22, 1950, plaintiff was in the employ of defendant as a spotter on what is known as the "cargo slip"; that plaintiff's duties on said job were to work on a barge brought into said slip; that on the dock a lumber carrier sets lumber on blocks and an overhead crane or monorail picks up lumber off the blocks, takes it to the barge and sets it on blocks on the barge; that plaintiff's particular duty was to set and keep the blocks on the barge straight; that on said date plaintiff had just set one set of blocks and the overhead crane or monorail had picked up a stack of lumber from the dock and had placed it on the blocks which plaintiff had set on the barge; that plaintiff was walking away from that area to get to a place of safety before the overhead crane or monorail would loosen its tongs from the load and raise the tongs; that while plaintiff was walking away, the tongs of the crane

struck plaintiff in the back, causing severe and serious injuries as more particularly set forth hereinafter.

III.

That on November 22, 1950, there was in effect in the State of Oregon what is commonly termed a "Safety Code for Sawmill, Woodworking, and Allied Industries of Oregon," effective January 2, 1946, promulgated and issued by the State Industrial Accident Commission of Oregon, which said code has heretofore been promulgated by said Commission for the benefit and safety of persons engaged in the sawmill industry in Oregon, including the plaintiff herein; that as a part thereof, under the general heading of "Loading, Stacking, Storage and Conveying," Rule 5.2, it is provided as follows:

"Units or loads of lumber shall not be lifted or moved until all employees are in the clear"

That defendant was reckless, careless and negligent in not complying with the said provision.

IV.

That defendant was reckless, careless and negligent in the following particulars:

(1) In operating said overhead crane or monorail in a reckless manner without any regard for the safety of the employees and, in particular, for the safety of this plaintiff;

(2) In failing to keep a proper or any lookout while engaged in the operation of said crane or monorail;

(3) In moving said crane or monorail without sounding a warning of any kind;

(4) In letting said monorail tongs down gradually as said cab moved forward rather than waiting until the cab was directly over the load and letting said tongs straight down.

(5) In failing to provide a safe place to work;

(6) In failing to notice and avoid striking plaintiff;

(7) In failing to use every device, care and precaution practicable to be used in that defendant could have operated said overhead crane or monorail with regard for the safety of the employees and in particular for the safety of plaintiff; could have kept a proper lookout while engaged in the operation of said crane or monorail; could have sounded a warning of some kind before moving said crane or monorail; could have let tongs straight down when the cab was directly over the load instead of letting said tongs down gradually as cab moved forward; could have provided a safe place to work and could have noticed and avoided striking plaintiff, all of which would have in no way impaired the efficiency of the operation.

V.

That as a direct and proximate result of the recklessness, carelessness and negligence of the defendant the heavy steel tongs of said crane or monorail struck plaintiff in the back causing severe bruises, contusions and lacerations to said back and further

tearing, twisting and wrenching the bones, muscles, ligaments and tendons of said back so that, over a long period of time, the pain was extremely severe in plaintiff's back and radiated down plaintiff's legs; that plaintiff has been forced to wear a brace on said back ever since said accident; plaintiff alleges that all of said injuries are permanent and all to his damage in the sum of \$60,000.00.

VI.

That prior to said accident plaintiff was a healthy and able-bodied working man of the age of 35 years with a life expectancy of 33.44 years, earning the sum of \$1.70 $\frac{1}{2}$ per hour, plus time and a half for all hours worked in any one week over forty; that as a direct and proximate result of the recklessness, carelessness and negligence of the defendant, plaintiff suffered a wage loss in the sum of \$2387.90 to the time of filing this complaint and has incurred doctor, nurses' and medical expenses in the sum of \$200.00 and reserved the right to amend his complaint at the time of trial to show the true amount of his special damages.

VII.

Plaintiff requests a jury trial.

Wherefore plaintiff demands judgment against the above-named defendant in the full sum of Sixty Thousand and 00/100 (\$60,000) general damages, in the full sum of Two Thousand Three Hundred Eighty-seven and 90/100 (\$2387.90) special damages and for his costs and disbursements incurred herein.

GREEN, RICHARDSON &
GREEN,

Attorneys for Plaintiff.

State of Oregon,
County of Lincoln—ss.

I, Leslie H. Chappell, being first duly sworn, depose and say that I am the plaintiff in the above-entitled cause; and that the foregoing Complaint is true as I verily believe.

LESLIE H. CHAPPELL.

Subscribed and sworn to before me this 29th day of August, A.D. 1951.

[Seal] W. C. EVANS,
Notary Public for Oregon.

My commission expires 4/20/53.

EXHIBIT B

In the Circuit Court of the State of Oregon for the
County of Lincoln

No. 9954

LESLIE H. CHAPPELL,
Plaintiff,
vs.

C. D. JOHNSON LUMBER CORP., a Corporation,
Defendant.

SUMMONS

To: C. D. Johnson Lumber Corp., a Corporation,
Defendant.

In the Name of the State of Oregon: You are hereby required to appear and answer the Complaint filed against you in the above-entitled cause within

ten days from the date of service of this Summons upon you, if served within this County; or if served within any other County of this State, then within twenty days from the date of the service of this Summons upon you; and if you fail so to answer, for want thereof, the Plaintiff will demand judgment against you in the full sum of Twenty-two Thousand and 00/100 (\$22,000.00) Dollars general damages, in the further sum of Two Thousand Three Hundred Eighty-seven and 90/100 (\$2387.90) special damages, and for his costs and disbursements incurred herein.

GREEN, RICHARDSON &
GREEN,

Attorneys for Plaintiff.

[Stamped]: Received Sept. 7, 1951. Timothy P. Welp, Sheriff of Lincoln Co., Oregon.

[Endorsed]: Filed September 15, 1951.

[Title of District Court and Cause.]

ANSWER

First Defense

I.

Defendant admits the allegations contained in paragraph I of plaintiff's complaint.

II.

Answering paragraph II of plaintiff's complaint, defendant admits that on or about November 22, 1950, plaintiff was in the employ of defendant as a spotter on what is known as the "cargo slip," that plaintiff's duties on said job were to work on a barge brought into said slip, that an overhead crane or monorail takes lumber to barges for loading, and that among plaintiff's duties was that of setting and keeping the blocks on barges straight. Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph II of plaintiff's complaint, and defendant denies each and every such remaining allegation contained in said paragraph II.

III.

Defendant admits that on November 22, 1950, there was in effect in the State of Oregon what is commonly termed a "Safety Code for Sawmill, Woodworking, and Allied Industries of Oregon," promulgated and issued by the State Industrial Accident Commission of Oregon for the benefit and safety of persons engaged in the sawmill industry in Oregon, including the plaintiff herein, and defendant admits all the terms and provisions of said Safety Code. Defendant denies each and every other allegation contained in said paragraph III.

IV.

Defendant denies each and every allegation contained in paragraph IV of plaintiff's complaint.

V.

Defendant denies each and every allegation contained in paragraph V of plaintiff's complaint and the whole thereof, and particularly denies that plaintiff has been damaged in the sum of \$22,000 or in any sum by reason of any act or omission on the part of this defendant.

VI.

Defendant denies each and every allegation contained in paragraph VI of plaintiff's complaint.

Second Defense

If, as alleged by plaintiff, plaintiff did, on or about November 22, 1950, meet with an accident and sustain any personal injuries, then said accident was caused by plaintiff's carelessness and negligence in that whatever risk or danger may have existed in connection with plaintiff's work was open, visible and plain to be seen and understood by any sawmill employee, including plaintiff, notwithstanding which plaintiff failed to observe or use ordinary care for his own safety.

Wherefore, having fully answered plaintiff's complaint, defendant prays that plaintiff take nothing thereby but that the same be dismissed, and that defendant have and recover of and from plaintiff defendant's costs and disbursements herein incurred.

KING, WOOD, MILLER,
ANDERSON & NASH,
/s/ FRANK E. NASH,
Attorneys for Defendant.

[Endorsed]: Filed September 28, 1951.

[Title of District Court and Cause.]

MOTION

Defendant respectfully moves the court for judgment on the pleadings under Rule 12 (c) of the Federal Rules of Civil Procedure, as amended, or in the alternative for summary judgment under Rule 56.

Defendant's motion is upon the ground that plaintiff's complaint herein shows that at the time plaintiff alleges he received injury he was in the employ of defendant at work aboard a barge upon the waters of the Yaquina River engaged in the work of loading the barge with lumber.

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A., Section 901 et seq., provides that liability of an employer for compensation under that act is exclusive and in place of all other liability.

KING, WOOD, MILLER,
ANDERSON & NASH,

/s/ FRANK E. NASH,
Attorneys for Defendant.

To Leslie H. Chappell, plaintiff above-named, and
to Burl L. Green and Green, Richardson and
Green, his attorneys:

Please take notice that the undersigned will bring the within motion on for hearing before the above-entitled court at the United States Courthouse, Portland, Oregon, on the 6th day of October, 1952, at

10:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard.

KING, WOOD, MILLER,
ANDERSON & NASH,

/s/ FRANK E. NASH,
Attorneys for Defendant.

[Endorsed]: Filed September 23, 1952.

[Title of District Court and Cause.]

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, Leslie H. Chappell, being first duly sworn, do depose and say:

That I am the plaintiff in the above-entitled suit; that prior to the time defendant's motion for summary judgment was filed I had no information concerning any rights that I might have under the Longshoremen's and Harbor Workers Compensation Act; and that in fact I had never heard of such Act prior to the time the motion was filed; that to my knowledge there was nothing posted at any conspicuous place on the C. D. Johnson premises, notifying myself or other employees that the defendant C. D. Johnson Lumber Corporation had secured payment of compensation under the Longshoremen's and Harbor Workers' Compensation Act.

Concerning my job at the C. D. Johnson Lumber Company, it was principally as a spotter on barges,

and in the performance of said job I often was on shore, as well as on the barge; that occasionally my job was to work exclusively ashore when I was doing something besides spotting on the barges; that my pay was the same pay as the laborers received who worked exclusively on the shore.

/s/ LESLIE H. CHAPPELL.

Subscribed and sworn to before me this 16th day of March, 1953.

[Seal] /s/ BURL L. GREEN,
Notary Public for Oregon.

My commission expires July 27, 1953.

Service of copy acknowledged.

[Endorsed]: Filed March 16, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The motion of defendant, C. D. Johnson Lumber Corporation, for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure having been presented, and Burl L. Green, counsel for plaintiff, and Frank E. Nash, counsel for defendant, having been heard on the motion, and it appearing by stipulation of counsel in open court that plaintiff received the injury of which he complains upon the navigable waters of the United States while aboard

a vessel of more than 18 tons net, and memoranda of authorities having been submitted on behalf of the parties, and the court being fully advised, makes the following findings of fact and conclusions of law:

Findings of Fact

I.

Defendant is a corporation organized and existing under and by virtue of the laws of Nevada, and is operating a sawmill at Toledo, Oregon, where defendant manufactures, handles and loads lumber products, a portion of which is moved by water.

II.

At all times herein material defendant's lumber carriers deposited loads of lumber on blocks on defendant's sawmill dock in the Yaquina River. By means of an overhead monorail crane, defendant picked up lumber from the sawmill dock and loaded the lumber on barges in the cargo slip at defendant's dock. When loaded the barges were moved on the Yaquina River by tugboats.

III.

Plaintiff was employed by defendant as a "spotter" in the loading of barges. Plaintiff's work was upon the barges being loaded in the cargo slip, and his particular duty was to set and keep straight the blocks on the deck of the barge onto which the lumber was loaded by the crane. On or about November 22, 1950, plaintiff was aboard a barge upon the navigable waters of the United States, and he sus-

tained injuries arising out of and in the course of his employment while the barge was being loaded with cargo. Specifically, plaintiff in his complaint contends: "that on said date plaintiff had just set one set of blocks and the overhead crane or monorail had picked up a stack of lumber from the dock and had placed it on the blocks which plaintiff had set on the barge; that plaintiff was walking away from that area to get to a place of safety before the overhead crane or monorail would loosen its tongs from the load and raise the tongs; that while plaintiff was walking away, the tongs of the crane struck plaintiff in the back, causing severe and serious injuries * * *." Plaintiff was not a master or member of a crew of any vessel. The barge aboard which plaintiff was injured was a vessel of over 18 tons net and of approximately 200 tons net.

IV.

At all times herein material defendant was an employer, some of whose employees, including plaintiff, were employed in maritime employment in whole or in part upon the navigable waters of the United States.

Conclusions of Law

I.

When injured, plaintiff was engaged in maritime employment for his employer upon the navigable waters of the United States. Plaintiff's injury occurred and arose out of and in the course of his employment aboard a vessel in navigable waters of the United States.

II.

Recovery for disability resulting from such injury through Workmen's Compensation proceedings may not validly be provided by state law.

III.

The injury and disability of which plaintiff complains are exclusively within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C., Section 901 et seq. Plaintiff cannot maintain an action against defendant to recover damages for such injury under the Employers' Liability Act of the State of Oregon.

IV.

Defendant is entitled to summary judgment for the reason that the pleadings and admissions by stipulation of the parties show that there is no genuine issue as to any material fact necessary to a determination that the injury of which plaintiff complains is a matter within the federal maritime jurisdiction and within the coverage of the Longshoremen's and Harbor Workers' Compensation Act.

Dated this 21st day of April, 1953.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 21, 1953.

The United States District Court
for the District of Oregon

Civil No. 6169

LESLIE H. CHAPPELL,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a
Corporation,

Defendant.

JUDGMENT ORDER

The above-entitled cause came on regularly before the court upon the motion of defendant C. D. Johnson Lumber Corporation, for summary judgment, and plaintiff having appeared in person and by Burl L. Green, of his attorneys, and defendant having appeared by Frank E. Nash, of its attorneys, and counsel for the parties having stipulated as agreed facts that plaintiff at the time of the injury of which he complains was aboard a barge of more than 18 tons net and was engaged in the work of loading the barge upon the navigable waters of the United States, and counsel for the parties having been heard upon the motion and memoranda of authorities having been submitted on behalf of the parties, and the court having considered the pleadings and all other matters filed herein and being fully advised, and the court having filed its findings of fact and conclusions of law, it is hereby
Ordered, Adjudged and Decreed that Defendant

C. D. Johnson Lumber Corporation's motion for summary judgment be and the same hereby is granted, and that plaintiff have and recover nothing by his suit herein, and that defendant have and recover of and from plaintiff its costs to be taxed by the clerk.

Dated this 21st day of April, 1953.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed April 21, 1953.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To C. D. Johnson Lumber Corporation, a corporation, and to King, Wood, Miller, Anderson & Nash, its attorneys:

Notice is hereby given that Leslie H. Chappell, plaintiff above-named, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain order and judgment of this court, made and entered on April 21, 1953, wherein a summary judgment was entered in favor of the above-named defendant.

Dated this 7th day of May, 1953.

/s/ GREEN, RICHARDSON &
GREEN,
Attorneys for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed May 14, 1953.

[Title of District Court and Cause.]

CONDENSED STATEMENT IN NARRATIVE
FORM OF TESTIMONY OF PLAINTIFF-
APPELLANT ON DEPOSITION SEPTEMBER 2, 1952

The following is the narrative form of the testimony by deposition of plaintiff on September 2, 1952, as set forth on pages 22 to 25, inclusive, of the transcript of deposition, the original of which is filed with this court:

At the time of the accident November 22, 1950, I had been working as a spotter on barges approximately 2½ months. It happened approximately 9:00 o'clock in the evening. Just before the accident I was at about the center of the barge, which is approximately 40 or 50 feet wide, and I was about a third of the way down toward the inshore end of the barge. I got down on the floor of the barge when the monorail crane operator started to set his load of lumber down on the barge. He set his load down. I turned it loose and hopped back up and walked 10 or 12 feet when the monorail crane operator moved without raising his tongs high enough to clear me and the tongs bumped me across the small of the back.

KING, MILLER, ANDERSON,
NASH & YERKE,

/s/ FRANK E. NASH,
Attorneys for Defendant.

[Endorsed]: Filed June 4, 1953.

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents numbered from 1 to 20, inclusive, consisting of Petition for removal; Answer; Motion for postponement of date of trial; Order setting pre-trial conference date; Motion to increase amount of damages, etc.; Order allowing increase in amount of damages; Defendant's motion dated September 23, 1952; Record of hearing on motion for summary judgment; Order setting date for argument on motion for summary judgment; Affidavit of Leslie H. Chappell; Findings of fact and conclusions of law; Judgment order; Notice of appeal; Bond for costs on appeal; Designation of contents of record on appeal; Statement of points on which plaintiff-appellant intends to rely on appeal; Appellee's designation of additional portions of the record, etc.; Condensed statement in narrative form of testimony of plaintiff-appellant on deposition September 2, 1952; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 6169, in which Leslie H. Chappell is plaintiff and appellant, and C. D. Johnson Lumber Corporation, a corporation, is defendant and appellee; that the said record has been prepared by me in accordance with the designations of contents of record on appeal filed by the appellant and appellee, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is \$5.00 and that the same has been paid by the appellant.

I further certify that there is inclosed herewith transcript of proceedings in re: motion of defendant for summary judgment, March 16, 1953.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 19th day of June, 1953.

[Seal] /s/ F. L. BUCK,
 Acting Clerk.

United States District Court
District of Oregon

No. Civil 6169

LESLIE H. CHAPPELL,

Plaintiff,

vs.

C. D. JOHNSON LUMBER CORPORATION, a
Corporation,

Defendant.

TRANSCRIPT OF PROCEEDINGS IN RE MO-
TION OF DEFENDANT FOR SUMMARY
JUDGMENT

March 16, 1953, 11:00 o'Clock A.M.

Before: The Hon. Gus J. Solomon,
District Judge.

Appearances:

BURL L. GREEN,
Of Attorneys for Plaintiff;

FRANK E. NASH,
Of Attorneys for Defendant.

Mr. Green: Before we begin, your Honor, for the record, may I file an affidavit signed by the plaintiff and certified upon so March 16, 1953?

The Court: Yes. First, I think we ought to read the admissions into the record.

Mr. Nash: That is what I prefer, if your Honor please.

The Court: Go ahead.

Mr. Nash: In the plaintiff's Complaint, it is stated that the plaintiff here was aboard a barge at the time he suffered injury, and it has since been agreed, I think, and made a matter of record in the plaintiff's brief filed here, that the barge was at the time of the injury, on navigable waters of the United States.

There was a question of your opinion as to whether or not the barges upon which the plaintiff was required to work were in excess of 18 tons net. It was one of the conditions that were covered by the act, that the vessel be in excess of 18 tons. Your Honor will recall, I think, at one time due to my error I was a little crossed up on the dates, and I called up from Toledo, the superintendent of the loading operation and explained it, that we wanted him to give testimony in support of our motion for

summary judgment to the effect that all of the barges used in those operations were of approximately 200 tons net so far as the act was concerned.

Your Honor suggested that since Burl was trying the case in the State Court, that I contact him at recess, or when it was possible. I did that, but I have not talked specifically with Burl with respect to the tonnage, but I think that matter should be covered. Would you be prepared to admit that the barges were in excess of 18 tons net?

Mr. Green: Mr. Nash gave me a picture of a barge, and I showed it to Mr. Chappell at the time he was up to Portland. He does not know whether it was the barge or not, but it was the approximate size, and I will admit it was a barge in excess of 18 tons so far as the jurisdictional portion of the long-shoreman's act is concerned. We will admit it for that purpose.

The Court: All right.

Mr. Nash: Well, then, your Honor, we have a factual situation in which it is admitted that Mr. Chappell was injured in the course of his employment while aboard a vessel in excess of 18 tons upon the navigable waters of the United States, and that the work which he was doing was, as stated in his complaint, the work of spotting these barge deckloads of lumber which were carried from the defendant's mill or from the defendant's dock on the barges by means of an overhead crane which lifted units of lumber with a tong-type of apparatus.

The Court: Where was this boom or derrick, on the barge itself?

Mr. Nash: No, the equipment is really not a boom. It is an overhead crane which is constructed upon a permanently constructed overhead frame supported by piling, and the crane runs along this overhead something like a steel mill, for example, where they have overhead cranes.

The Court: Yes, I know that. It is rectangular-shaped, rather than A-frame; is that right?

Mr. Green: If I understand your question, it is a monorail that runs through the whole plant, and this portion comes out over the barge, direct connection up on shore.

Mr. Nash: Well, when it runs out over the barges, of course, the supporting pillars are piling driven into the water.

(Discussion between Court and counsel.)

Mr. Nash: Now, there is one other condition which has been mentioned by the plaintiff, and that is as to whether the defendant had secured compensation as required under the act.

I may state to your Honor that that compensation has been secured, was secured at the time by the St. Paul Mercury Indemnity Company, and I have discussed that heretofore with Mr. Green, and my feeling is that that is a condition subsequent, really in the nature of a condition subsequent, but I think perhaps that point, if Burl is not yet satisfied, could be reserved until he has had an opportunity to examine the actual policy.

The Court: You mean at the time of the accident there was a policy which would protect em-

ployees of the C. D. Johnson Lumber Company who were engaged in work covered by the Longshoremen's and Harbor Workers' Act?

Mr. Nash: Yes, your Honor, the Act requires that the compensation be secured through private insurers.

The Court: And that prior to the accident, there was such a policy?

Mr. Nash: Yes, sir.

(Argument to the Court by counsel.)

The Court: Let us get back to the record in this case. I understand that you are not admitting first, that the defendant had a policy of insurance to cover it for the claims under the Longshoremen's and Harbor Workers' Act?

Mr. Green: That is right.

The Court: Second, that if it did have such coverage, that the employer failed to comply with the Act in that he failed to have notice posted in a conspicuous place and, perhaps, as to those other grounds as well?

Mr. Green: That is right, your Honor.

Mr. Nash: May I be heard just briefly on that?

The Court: Yes.

(Argument by counsel to the Court.)

(Hearing concluded.)

[Endorsed]: Filed June 4, 1953.

[Endorsed]: No. 13883. United States Court of Appeals for the Ninth Circuit. Leslie H. Chappell, Appellant, vs. C. D. Johnson Lumber Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed June 22, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

The point on which appellant intends to rely in the above-entitled cause is as follows:

1. The District Court erred in allowing defendant's motion for summary judgment.

Dated this 23rd day of June, 1953.

GREEN, RICHARDSON &
GREEN,

By /s/ BURL L. GREEN,
Attorneys for Plaintiff-
Appellant.

Service of copy acknowledged.

[Endorsed]: Filed June 25, 1953.

In the United States Court of Appeals
for the Ninth Circuit

LESLIE H. CHAPPELL,
Plaintiff-Appellant,
vs.

C. D. JOHNSON LUMBER CORPORATION, a
Corporation,
Defendant-Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON APPEAL

